

SUPER LAW GROUP, LLC

September 8, 2015

Via Certified Mail, Return Receipt Requested

2015 SEP 14 AM 11:55

Filco Carting Corp.
Rudolph C. Filiberto
111 Gardner Ave.
Brooklyn, NY 11237

Filco Environmental Services, LLC
111 Gardner Avenue
Brooklyn, NY 11237

Nationwide Scrap, LLC
111 Gardner Avenue
Brooklyn, NY 11237

C Filiberto & Sons, Inc.
Rudolph Filiberto
P.O. Box 176
672 Grand Boulevard
Deer Park, NY 11729-0176

Cicale Carting Corp.
Peter Cicale
P.O. Box 589
Chappaqua, NY 10514

C.f. Waste Paper Co., Inc.
111 Gardner Avenue
Brooklyn, NY 11237

Meserole St. Recycling, Inc.
Rudolph C. Filibeato (sic)
568 Meserole St.
Brooklyn, NY 11237

Filiberto Recycling, Inc.
Peter Filiberto
568 Meserole St.
Brooklyn, NY 11237

Filiberto Bros., Inc.
Peter C. Filiberto
51 Westbrook Lane
Roosevelt, NY 11575

Re: Notice of Violation and Intent to File Suit under the Clean Water Act

Dear All:

We are writing on behalf of Riverkeeper, Inc.¹ ("Riverkeeper") to notify you of Riverkeeper's intent to file suit against Filco Carting Corp., Rudolph C. Filiberto, Filco Environmental Services, LLC, Nationwide Scrap, LLC, C Filiberto & Sons, Inc., Cicale Carting Corp., Peter Cicale, C.f. Waste Paper Co., Inc., and Meserole St. Recycling, Inc., Filiberto Recycling, Inc.,

¹ Riverkeeper, Inc. is a not-for-profit environmental organization existing under the laws of the state of New York, headquartered in Ossining, New York. Riverkeeper's mission includes safeguarding the environmental, recreational and commercial integrity of the Hudson River and its ecosystem, as well as the watersheds that provide New York City with its drinking water. Riverkeeper achieves its mission through public education, advocacy for sound public policies and participation in legal and administrative forums. Riverkeeper has more than 4,500 members, many of whom reside near to, use and enjoy the Hudson River and the waters and tributaries of New York Harbor, including Newtown Creek, Coney Island Creek, Jamaica Bay, and the Gowanus Canal; waters that are polluted by industrial stormwater runoff.

Peter Filiberto, and Filiberto Bros., Inc. (together, "Filco") pursuant to Section 505(a) of the federal Clean Water Act ("CWA")² for violations of the CWA.

Riverkeeper intends to file suit, as an organization and on behalf of its adversely affected members, in the United States District Court for the Eastern District of New York seeking appropriate equitable relief, civil penalties, and other relief no earlier than 60 days from the postmark date of this letter.³

Riverkeeper intends to take legal action because Filco is discharging polluted stormwater from Filco's facility located near Newtown Creek in Brooklyn ("the Facility") to the waters of the United States without a permit. This is a violation of Sections 301(a) and 402(p)(2)(B) of the Clean Water Act.⁴ Further, Filco has not applied for coverage under, nor complied with the conditions of, an individual National Pollutant Discharge Elimination System ("NPDES") permit or the General Permit for the Discharge of Stormwater Associated with Industrial Activity ("General Permit")⁵ issued by the New York State Department of Environmental Conservation ("DEC"), in violation of Sections 402(p), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).

The street address of the Facility is provided in government records as 111 Gardner Avenue and 568 Meserole Street, Brooklyn, NY. For clarity, the Facility location can be uniquely identified by tax block and lot numbers as block 2977 lots 14, 15, and 16, and block 2978, lot 1 in Kings County. The waters of the United States that are polluted by the Facility are Newtown Creek and the East River.

I.

BACKGROUND

With every rainfall event, hundreds of millions of gallons of polluted rainwater pour into New York Harbor, Long Island Sound, and other receiving waters. The consensus among agencies and water quality specialists is that stormwater pollution accounts for more than half of the total pollution entering the marine environment each year.⁶

DEC has designated more than 7,000 river miles, 319,000 acres of larger waterbodies, 940

² 33 U.S.C. § 1365(a). We refer to statutory provisions by their section in the Clean Water Act and provide the parallel citation to the United States Code only on first reference.

³ See 40 C.F.R. § 135.2(a)(3)(c) (notice of intent to file suit is deemed to have been served on the postmark date).

⁴ 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).

⁵ New York State Department of Environmental Conservation, *SPDES Multi-Sector General Permit For Stormwater Discharges Associated With Industrial Activity*, Permit No. GP-0-12-001, (hereinafter "General Permit"), available at <http://www.dec.ny.gov/chemical/9009.html>. This General Permit replaces earlier general permits for the discharge of stormwater associated with industrial activity. It became effective on October 1, 2012, and will expire on September 30, 2017.

⁶ Stormwater is water from precipitation events that flows across the ground and pavement after it rains or after snow and ice melt. See 40 C.F.R. § 122.26(b)(13).

square miles of bays and estuaries, and 592 miles of Great Lakes shoreline in the State as “impaired,” or not meeting water quality standards, and unable to support beneficial uses such as fish habitat and water contact recreation.⁷ For the overwhelming majority of water bodies listed as impaired, stormwater runoff is cited as a primary source of the pollutants causing the impairment. Contaminated stormwater discharges can and must be controlled in order to improve the quality and health of these waterbodies.

Stormwater discharges flow from the Facility through a separate sewer system into Newtown Creek and ultimately into the East River and New York Harbor. DEC has classified Newtown Creek as an SD water.⁸ Under New York’s Water Quality Standards, a waterbody that is designated as SD is meant to be suitable for fishing and for fish, shellfish and wildlife survival.⁹ The New York Water Quality Standards also set numeric and narrative criteria for different water pollution parameters including dissolved oxygen, oil and grease, suspended and settleable solids, bacteria (pathogens), pH, temperature, nutrients, and others. A waterbody must meet these numeric and narrative criteria in order to support its designated uses.¹⁰

Newtown Creek, a Superfund site, consistently fails to meet state water quality standards; illegal stormwater discharges from this Facility contribute to this failure.¹¹ In the past, DEC has designated Newtown Creek as impaired pursuant to Section 303(d) of the CWA¹² for failure to meet minimum water quality standards due to high oxygen demand (low levels of dissolved oxygen) and the presence of floatables (oil, grease, and other debris) attributable in part to urban stormwater runoff.¹³ While the Creek has been removed from the list of waterbodies for which a Total Maximum Daily Load (“TMDL”) must be developed, the degraded water quality conditions that led to the impaired listing have not been addressed; polluted discharges to Newtown Creek continue to reduce the dissolved oxygen level in the Creek.¹⁴ **Illegal stormwater discharges from this Facility carry oxygen demanding chemicals into Newtown Creek and therefore contribute directly to this problem.**

For years, Newtown Creek was treated as an industrial dumping ground; businesses along its banks polluted with abandon. In recent decades, New York City has worked to reclaim the quality of New York Harbor and of Newtown Creek. The City and local residents have invested heavily in efforts to rejuvenate the Creek and surrounding neighborhoods. Recently, the U.S. EPA joined the effort by designating Newtown Creek as a Superfund site, setting aside funds for

⁷ See EPA, Watershed Assessment, Tracking and Environmental Results, New York Assessment Data for 2012, http://ofmpub.epa.gov/waters10/attains_state.report_control?p_state=NY&p_cycle=2012&p_report_type=A (last visited Oct. 15, 2014).

⁸ See 6 N.Y.C.R.R. § 890.6.

⁹ See 6 N.Y.C.R.R. § 701.14.

¹⁰ See 6 N.Y.C.R.R. §§ 702, 703.

¹¹ See NY DEC, *Impaired/DeListed Waters NOT Included on the 2014 Section 303(d) List Sept. 2014*, available at http://www.dec.ny.gov/docs/water_pdf/303dlistfinal2014.pdf (hereinafter “303(d) List”).

¹² 33 U.S.C. § 1313(d).

¹³ See 303(d) List.

¹⁴ See *Id.*

a cleanup, and mobilizing public and private efforts to restore the Creek to a healthier state.¹⁵ It is time for Filco to join fully in this broader effort to restore the biological integrity of Newtown Creek. At a minimum, Filco must stop illegally discharging polluted stormwater and other effluents.

II.

STANDARDS AND LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED AND ACTIVITIES ALLEGED TO BE VIOLATIONS

A. Filco is Discharging Stormwater Associated with Industrial Activity to Waters of the United States without a Permit.

The CWA prohibits the discharge of pollutants to the waters of the United States except in accordance with a valid NPDES permit.¹⁶ Filco's industrial activity at the Facility has caused and continues to cause a "discharge of pollutants" within the meaning of Section 502(12) of the CWA¹⁷ and a "stormwater discharge associated with industrial activity" within the meaning of 40 C.F.R. § 122.26(b)(14) from the Facility on at least each and every day that there has been a rain event of more than 0.1 inches.¹⁸ The Facility has exposed and continues to expose industrial pollutants to stormwater, at a minimum, (a) storing dumpsters, roll-off containers, trucks and other machinery outside or otherwise exposing them to the elements, and (b) from vehicles entering and leaving the Facility that track pollutants off site. During precipitation events (including runoff from rainfall and snow or ice melt events), pollutants are carried away from the Facility in stormwater discharges into Newtown Creek.

Filco's activities at the Facility include but are not limited to the collection of commercial sanitary waste, scrap metal, paper, and other recyclable wastes, and outdoor storage of trucks, heavy machinery, and vehicle maintenance. These activities include operation and storage of industrial equipment and much of this activity is conducted outdoors. In carrying out these activities at the Facility, Filco engages in storing, and handling materials in a manner that exposes pollutants to precipitation and snowmelt. The stormwater discharged into Newtown Creek can bring solids that suspend or dissolve in stormwater, metals, hydraulic fluids, fuel, and other pollutants into the Creek.¹⁹

¹⁵ See 40 C.F.R. Part 300, App. B.

¹⁶ See CWA §§ 301(a) and 402.

¹⁷ 33 U.S.C. § 1362(12).

¹⁸ EPA has determined that precipitation greater than 0.1 inches in a 24-hour period constitutes a measurable precipitation event for the purposes of evaluating stormwater runoff associated with industrial activity. See, e.g., 40 C.F.R. § 122.26(c)(1)(E)(6) (using 0.1 inches as the distinguishing threshold of a storm event).

¹⁹ See EPA, "Industrial Stormwater Fact Sheet Series, Sector P: Motor Freight Transportation Facilities, Passenger Transportation Facilities, Petroleum Bulk Oil Stations and Terminals, Rail Transportation Facilities, and United States Postal Service Transportation Facilities," available at http://water.epa.gov/polwaste/npdes/stormwater/upload/sector_p_transportationfacilities.pdf.

Riverkeeper has observed and documented evidence of the release of polluted stormwater at the Facility. Riverkeeper has observed trucks, dumpsters, roll-off containers, and other waste hauling equipment stored at the Facility uncovered and exposed to precipitation. The entire Facility is paved, and the paving and grading of the Facility confine and channel water such that it pools near the Meserole Street exit and flows down towards the street and into storm drains. The stormwater that runs off the Facility contains debris, suspended solids, and other pollutants.

Trucks and other vehicles driving on and off the property are also point sources of pollution. The Facility uses heavy vehicles and stationary machinery outdoors. Besides the wastes they carry, vehicles and industrial equipment at the Facility may expose many other pollutants to the elements, including gasoline, diesel fuel, anti-freeze, and hydraulic fluids. Filco's garbage trucks are parked on the street and constitute point sources of water pollution in and of themselves, and Riverkeeper has observed polluted stormwater on the street next to and below these trucks. Riverkeeper believes that vehicle maintenance and repairs are conducted in and around buildings at the Facility.

All of these pollution sources are exposed to precipitation and snowmelt. In addition to waste residues, these pollution sources also may release fuel, oil, lubricants, PCBs, PAHs, an array of metals, pH-affecting substances and chemical residues. These toxic pollutants are often generated in the form of small particulate matter, which settles on the ground and other surfaces that are exposed to stormwater and non-stormwater flows.

Because Filco fails to adequately shelter and otherwise contain these materials to prevent their release to the environment, precipitation falls on and flows over exposed materials, fluids, and particulates. Polluted stormwater discharges flow from the Facility to a storm drain and into Newtown Creek. As noted above, Riverkeeper has observed stormwater flowing off of the Facility and into storm drains connected to Newtown Creek.

Stormwater, objects, and debris are then conveyed off-site, enter a storm drain at the corner of Gardner Avenue and Meserole Street and another on Meserole Street between Gardner Avenue and Stuart Avenue. These storm drains are part of a separate sewer system and discharge directly into Newtown Creek. Further, vehicles at the Facility track dust, particulate matter, and other contaminants to areas on and off the premises from which these pollutants can enter stormwater and, ultimately, Newtown Creek and the New York Harbor.

Newtown Creek is a "water of the United States," as defined in 40 C.F.R. § 122.2 and, therefore, "navigable water" as defined in Section 502(7) of the CWA. Filco does not have a NPDES permit for these discharges of pollutants. Thus, Filco is discharging polluted industrial stormwater into navigable waters of the United States without the permit required under Sections 301 and 402 of the CWA.

B. Filco is Violating the Clean Water Act by Failing to Apply for NPDES Permit Coverage.

Filco provides roll off container services and commercial sanitary waste and recyclables collection and transportation. Accordingly, Filco is an industrial discharger engaged in collecting and transporting refuse under Standard Industrial Classification ("SIC") Code 4212, which is an industrial activity included in Sector P of the General Permit.

To be eligible to discharge under the General Permit, Filco must submit to DEC a registration form called a "Notice of Intent."²⁰ Notice of Intent forms are available online from DEC.²¹ To register, Filco is required, among other things, to list all stormwater discharges, including descriptions of the industrial activities taking place in the drainage area of each discharge and the acreage of industrial activity exposed to stormwater, the separate storm sewer system or immediate surface water body or wetland to which site runoff discharges, and the name of the watershed and nearest waterbody to which the site ultimately discharges and information about whether the receiving waters are impaired.²² Filco has failed to prepare and file a Notice of Intent or an application for an individual permit.²³

C. Filco is Violating the Clean Water Act by Failing to Comply with the General Permit.

As a discharger of stormwater associated with industrial activity, Filco must comply at all times with the requirements of the General Permit (or an individual permit).²⁴ By discharging stormwater associated with industrial activity without complying with the General Permit, Filco is violating CWA Sections 301(a) and 402(a) and (p).²⁵ The main General Permit requirements that Filco has failed and continues to fail to meet are explained further below.

²⁰ See General Permit, Part I.E.3. In notifying Filco that the Clean Water Act requires coverage under and compliance with a valid NPDES permit in order to lawfully discharge, and that submission of a Notice of Intent to DEC is required in order to obtain coverage under the General Permit, Riverkeeper does not concede that all of the activities conducted at the Facility are necessarily eligible for coverage under that permit. For example, if the Facility is discharging process wastewater, such as wash water, or has any other polluted non-stormwater discharge that is not authorized by the General Permit, then an individual NPDES permit is required and the failure to obtain and comply with an individual NPDES permit for such discharges also violates CWA §§ 301(a) and 402(p). The conditions for eligibility to discharge under the General Permit are provided in Part I.C of the permit.

²¹ See http://www.dec.ny.gov/docs/water_pdf/gpnoi.pdf.

²² See Division of Water, NY DEC, *Notice of Intent For Stormwater Discharges Associated with Industrial Activity under the State Pollutant Discharge Elimination System (SPDES) Multi-Sector General Permit GP-0-12-001 (MSGP)* (2012), available at http://www.dec.ny.gov/docs/water_pdf/gpnoi.pdf.

²³ A thorough search of EPA's Enforcement & Compliance History Online ("ECHO") database and DEC's records reveals that no Notice of Intent has been submitted for the Facility.

²⁴ This section discusses the compliance requirements of the General Permit. If Filco elects to seek coverage under an individual NPDES permit instead, the conditions of that individual permit will be at least as strict as those of the General Permit, thus Filco will still be required to comply with all of the following.

²⁵ Sections 301(a) and 402(a) and (p) make it unlawful for Filco to discharge stormwater associated with industrial activity without first complying with all of the conditions established in a NPDES permit.

1. Filco has not developed and implemented a Stormwater Pollution Prevention Plan.

Before submitting a registration form, Filco must prepare, make available, and implement a Stormwater Pollution Prevention Plan ("SWPPP") in accordance with schedules established in the General Permit.²⁶ The SWPPP must identify potential sources of pollution that may affect the quality of stormwater discharges associated with industrial activity. Further, the SWPPP must describe and ensure the implementation of practices that minimize the discharge of pollutants in these discharges and that assure compliance with the other terms and conditions of the General Permit, including achievement of effluent limitations.²⁷

Among other things, the SWPPP must include: a general site description, a general location map identifying the location of the facility and all receiving waters to which stormwater discharges, information related to a company stormwater pollution prevention team, a summary of potential pollutant sources, a description of control measures and best management practices, and schedules and procedures for implementation of control measures, monitoring and inspections.²⁸

Filco has not developed and implemented a legally compliant SWPPP, as required by Part III of the General Permit.²⁹

2. Filco has not implemented control measures and Best Management Practices that are selected to meet best available technology standards.

Filco cannot legally discharge stormwater under the General Permit until Filco implements mandatory general and sector-specific control measures called Best Management Practices ("BMPs") in order to minimize the discharge of pollutants from the Facility.³⁰ The selected measures must reduce the discharge of pollution from the Facility to the extent practicable through use of the best available technology for the industry.

The General Permit requires that "[t]he owner or operator must select, design, install, and implement control measures (including best management practices)," in accordance with good engineering practices, to meet the effluent limits contained in the permit.³¹ The General Permit's effluent limits include both numeric limits specific to certain sectors³² and non-numeric technology-based effluent limits that apply to all facilities.³³ These non-numeric technology-

²⁶ See General Permit Part III.B.

²⁷ See General Permit Part III.A.

²⁸ See General Permit Part III.C.

²⁹ Riverkeeper believes no SWPPP exists. If a SWPPP exists, then it is either facially inadequate or has not been fully and adequately implemented.

³⁰ See General Permit Part I.B.1, *see also* Part VII (setting forth sector-specific control measures and practices).

³¹ General Permit Part I.B.1.a. *See also* Part III.C.7 ("The SWPPP must document the location and type of BMPs installed and implemented at the facility to achieve the non-numeric effluent limits in Part I.B.1.a.(2) and where applicable in Part VIII, and the sector specific numeric effluent limitations in Part VIII.").

³² See General Permit, Part VIII.

³³ See General Permit, Part I.B.1.a.2.

based restrictions include minimizing the exposure of pollutants to stormwater³⁴ and minimizing the discharge of pollutants in stormwater³⁵ “to the extent achievable using control measures (including best management practices) that are technologically available and economically practicable and achievable in light of best industry practice.”³⁶

Filco has not minimized the discharge of pollution to the extent achievable by implementing control measures or BMPs that are technologically achievable and economically practicable and achievable in light of best industry practice, as required by Parts I.B.1 and VIII of the General Permit.

3. Filco has not conducted routine site inspections or complied with monitoring, recordkeeping, and reporting requirements.

Filco must conduct an annual comprehensive site inspection and evaluation of areas where industrial materials or activities are exposed to precipitation or where spills and leaks have occurred within the past three years.³⁷ The inspection must ensure that all stormwater discharges are adequately controlled and that all BMPs are functioning as expected.³⁸ Records of this inspection must be kept for five years.³⁹

In addition, qualified facility personnel must carry out routine inspections at least quarterly.⁴⁰ During these inspections, personnel must evaluate conditions and maintenance needs of stormwater management devices, detect leaks and ensure the good condition of containers, evaluate the performance of the existing stormwater BMPs described in the SWPPP, and document any deficiencies in the implementation and/or adequacy of the SWPPP.⁴¹ Such deficiencies must then be addressed through corrective actions.

The General Permit requires that all covered facilities conduct multiple types of analytical monitoring, and DEC may require additional individualized monitoring as well.⁴² In particular, all facilities authorized under the General Permit must:

- collect and analyze stormwater samples for each outfall at least annually;⁴³

³⁴ See General Permit, Part I.B.1.a.2.a.

³⁵ See General Permit, Part I.B.1.a.2.f.

³⁶ See General Permit, Part I.B.1 (“In the technology-based limits included below and in Part VIII, the term ‘minimize’ means reduce and/or eliminate to the extent achievable using control measures (including best management practices) that are technologically available and economically practicable and achievable in light of best industry practice.”).

³⁷ See General Permit, Part IV.A.1.

³⁸ See General Permit, Part IV.A.1.

³⁹ See General Permit, Part IV.A.2.

⁴⁰ See General Permit, Part III.C.7.b.2.

⁴¹ See General Permit, Part III.C.7.b.1 and b.3.

⁴² See General Permit, Part IV.B.3.

⁴³ See General Permit, Part IV.B.1.c (requiring at least annual collection and analysis of stormwater samples). See General Permit, Part IV.B.1.d, .e, .f, and .g for obligations to sample more frequently.

- conduct visual monitoring of stormwater discharges at least quarterly;⁴⁴
- perform an annual dry weather inspection to detect non-stormwater discharges;⁴⁵
- inspect, sample and monitor discharges from coal pile runoff;⁴⁶
- inspect, sample and monitor discharges from secondary containment structures and transfer areas;⁴⁷
- document storm events during which any samples are taken;⁴⁸
- document all of these monitoring activities;⁴⁹
- keep records of the monitoring with the Facility's SWPPP;⁵⁰ and
- submit an annual report to DEC accompanied by a Discharge Monitoring Report detailing the results of all required stormwater samples, as well as reports that documents any instance of non-compliance with benchmarks or numeric effluent limitations.⁵¹

Because Filco engages in industrial activities associated under Sector P, sampling is required for:

- Oil & Grease;
- Chemical Oxygen Demand;
- Benzene;
- Ethylbenzene;
- Toluene; and
- Xylene.⁵²

Riverkeeper is not necessarily aware of all industrial activities taking place at the Facility. To the extent that industrial activities other than the above are carried out at the Facility, other sampling may be required as well.⁵³ This notice provides Filco with sufficient information to identify the standards and limitations that apply to all categories of industrial activity.

Filco has failed to conduct the required annual and other routine inspections, monitoring, and testing, as required by, at least, Parts III, IV, and VIII of the General Permit. Filco also has failed to retain records and submit monitoring reports to DEC, as required by, at least, Parts IV and VIII of the General Permit.

⁴⁴ See General Permit, Part IV.B.1.a.

⁴⁵ See General Permit, Part IV.B.1.b.

⁴⁶ See General Permit, Part IV.B.1.d.

⁴⁷ See General Permit, Part IV.B.1.f.

⁴⁸ See General Permit, Part IV.B.2.c.

⁴⁹ See, e.g., General Permit, Parts IV.B.1.a.8, IV.B.1.b.4, IV.B.1.c.9, *see generally* Part IV.E.

⁵⁰ See General Permit, Part IV.E.

⁵¹ See General Permit, Part IV.B.1 and 2 and Part IV.C.

⁵² See General Permit, Part VIII, Sector P.

⁵³ See General Permit, Part VIII.

4. Filco has failed to comply with additional requirements located in Part VIII of the General Permit.

As noted above, the General Permit contains various requirements specific to Sector P. These requirements, some of which are referenced above, are collected in Part VIII of the General Permit. They include:

- A requirement that the site map identify the locations of any of the following activities or sources:
 - Fueling stations;
 - Vehicle/equipment maintenance or cleaning areas;
 - Storage areas for vehicle/equipment with actual or potential fluid leaks;
 - Loading/unloading areas;
 - Areas where treatment, storage or disposal of wastes occur; liquid storage tanks;
 - Processing areas;
 - Storage areas; and
 - All monitoring areas
- A requirement to describe and assess in Filco's SWPPP the potential for the following to contribute pollutants to stormwater discharges:
 - On-site waste storage or disposal;
 - Dirt/gravel parking areas for vehicles awaiting maintenance; and,
 - Fueling areas.
- A requirement that the following areas/activities be included in all inspections:
 - Storage area for vehicles /equipment awaiting maintenance;
 - Fueling areas;
 - Indoor and outdoor vehicle/equipment maintenance areas;
 - Material storage areas;
 - Vehicle/equipment cleaning areas; and
 - Loading/unloading areas.
- A requirement that employee training take place, at a minimum, annually (once per calendar year) and address the following, as applicable:
 - Used oil and spent solvent management;
 - Fueling procedures;
 - General good housekeeping practices;
 - Proper painting procedures; and
 - Used battery management.

- A requirement that storage of vehicles and equipment awaiting maintenance with actual or potential fluid leaks be confined to designated areas (delineated on the site map). The SWPPP shall document considerations of the following BMPs (or their equivalents):
 - The use of drip pans under vehicles and equipment;
 - Indoor storage of vehicles and equipment;
 - Installation of berms or dikes;
 - Use of absorbents;
 - Roofing or covering storage areas; and
 - Cleaning pavement surface to remove oil and grease.
- A requirement that storage vessels of all materials (e.g., for used oil/oil filters, spent solvents, paint wastes, hydraulic fluids) are maintained in good condition, so as to prevent contamination of stormwater, and plainly labelled (e.g., "used oil," "spent solvents," etc.). The SWPPP shall document considerations of the following storage-related BMPs (or their equivalents):
 - Indoor storage of the materials;
 - Installation of berms/dikes around the areas, minimizing runoff of stormwater to the areas;
 - Using dry cleanup methods; and
 - Treating and/or recycling the collected stormwater runoff.
- A requirement that the SWPPP describe and provide for implementation of measures that prevent or minimize contamination of stormwater runoff from all areas used for vehicle/equipment cleaning. The SWPPP shall document considerations of the following BMPs (or their equivalents):
 - Performing all cleaning operations indoors;
 - Covering the cleaning operation;
 - Ensuring that all wash waters drain to a proper collection system (i.e., not the stormwater drainage system unless SPDES permitted); and,
 - Treating and/or recycling the collected stormwater runoff.
- A requirement that the SWPPP describe and provide for implementation of measures that prevent or minimize contamination of the stormwater runoff from all areas used for vehicle/equipment maintenance. The SWPPP shall document consideration of the following BMPs (or their equivalents):
 - Performing maintenance activities indoors; using drip pans;
 - Keeping an organized inventory of materials used in the shop;
 - Draining all parts of fluids prior to disposal;
 - Prohibiting wet clean up practices where the practices would result in the discharge of pollutants to stormwater drainage systems;

- Using dry cleanup methods;
- Treating and/or recycling collected stormwater runoff; and
- Minimizing runoff of stormwater to maintenance areas.⁵⁴

Filco's activities are included in the definition of industrial activity to which the CWA applies. Therefore, Filco must obtain coverage under and comply with the requirements of the General Permit, including those specific to Filco's industrial activities, as described in Part VIII and outlined above. Filco has failed to obtain coverage under the General Permit and comply with these additional requirements.

5. Filco is Discharging a Pollutant of Concern to Impaired Waters

Discharges to an impaired waterbody are not eligible for coverage under the General Permit if the cause of impairment is a pollutant of concern included in the benchmarks and/or effluent limitations to which the facility is subject unless the facility:

- Prevents all exposure to stormwater of the pollutant(s) for which the waterbody is impaired,
- Documents that the pollutant for which the waterbody is impaired is not present onsite, or
- Provides additional information in the SWPPP to minimize the pollutant of concern causing the impairment as specified in Part III.F.4.⁵⁵

Newtown Creek is an impaired waterbody.⁵⁶ Its impairment is caused by low dissolved oxygen and presence of floatables. Chemical demand oxygen is included in the benchmarks monitoring requirements to which the Facility is subject. Filco has not prevented all exposure of chemicals demanding oxygen. Filco has not documented that chemical oxygen demand is not present onsite. Filco has not submitted a SWPPP with the additional information specified in Part III.F.4 of the General Permit.

In addition, because Newtown Creek is impaired by a pollutant of concern included in the benchmarks and/or effluent limitations to which the facility is subject, Filco is required to collect and analyze stormwater samples for each outfall for chemical demand oxygen quarterly.⁵⁷ Filco has failed to comply with this requirement by collecting and analyzing stormwater samples quarterly.

6. Filco is Clearly Violating the Clean Water Act.

In sum, Filco's discharge of stormwater associated with industrial activities without a permit, Filco's failure to apply for permit coverage, and Filco's failure to comply with the above-listed

⁵⁴ See General Permit, Part VIII, Sector P.

⁵⁵ See General Permit Part II.C.1.

⁵⁶ 303(d) List.

⁵⁷ See General Permit, Part IV.B.1.g.

conditions of the General Permit (or an individual NPDES permit) constitute violations of the General Permit and of Sections 301(a) and 402(p) of the Clean Water Act.

III.

PERSONS RESPONSIBLE FOR ALLEGED VIOLATIONS

Filco Carting Corp., Rudolph C. Filiberto, Filco Environmental Services, LLC, Nationwide Scrap, LLC, C Filiberto & Sons, Inc., Cicale Carting Corp., Peter Cicale, C.f. Waste Paper Co., Inc., and Meserole St. Recycling, Inc., Filiberto Recycling, Inc., Peter Filiberto, and Filiberto Bros., Inc. are the responsible parties for the violations alleged in this Notice (as defined by Section 502(5) of the CWA). Riverkeeper believes that Filco has operated the Facility since 1988⁵⁸ and currently advertises via the internet (<http://www.filcocarting.com/>) as the operator of the Facility. Filco has operational control over the day-to-day industrial activities at this Facility. Therefore, Filco is responsible for managing stormwater at the Facility in compliance with the CWA. Riverkeeper hereby puts Filco on notice that if Riverkeeper subsequently identifies additional persons as also being responsible for the violations set forth above, Riverkeeper intends to include those persons in this action.

IV.

LOCATION OF THE ALLEGED VIOLATION

The violations alleged in this Notice have occurred and continue to occur at the Facility located at 111 Gardner Avenue and 568 Meserole Street, Brooklyn, New York. For clarity, the Facility location can be uniquely identified as block 2977, lots 14, 15, and 16, and block 2978, lot 1 in Kings County. Stormwater flows from the Facility into a separate sewer system that discharges directly into Newtown Creek. The failure to develop and implement pollution prevention plans and take the other required measures are violations occurring at the Facility in general and in the inadequate documents themselves.⁵⁹

⁵⁸ Filco Carting Corp. incorporated in New York in 1988.

⁵⁹ The federal courts have held that a reasonably specific indication of the area where violations occurred, such as the name of the facility, is sufficient and that more precise locations need not be included in the notice. See, e.g., *Natural Resources Defense Council v. Southwest Marine, Inc.*, 945 F. Supp. 1330, 1333 (S.D. Cal. 1996), aff'd 236 F.3d 985, 996 (9th Cir. 2000); *City of New York v. Anglebrook Ltd. Partnership*, 891 F. Supp. 900, 908 (S.D.N.Y. 1995); *Assateague Coastkeeper v. Alan & Kristin Hudson Farm*, 727 F. Supp. 2d 433, 439 (D. Md. 2010); *United Anglers v. Kaiser Sand & Gravel Co.*, No. C 95-2066 CW, 1995 U.S. Dist. LEXIS 22449 at *4 (N.D. Cal. Sept. 27, 1995).

V.

DATES OF VIOLATION

Every day upon which Filco has failed to apply for permit coverage since Filco first commenced operations at the Facility and discharged polluted stormwater is a separate violation of Sections 301(a) of the CWA and EPA's regulations implementing the CWA.⁶⁰ These days of violation have continued consecutively since 1992, when Filco was required to obtain permit coverage.

Additionally, Filco has discharged without a permit in violation of Section 301(a) of the CWA on every day since Filco commenced operations at the Facility on which there has been a measurable precipitation event or discharge of previously accumulated precipitation (i.e., snowmelt) over 0.1 inches.

Finally, if Filco seeks permit coverage after receiving this letter but fails to fully comply with the requirements of the General Permit (or an individual permit), each day upon which Filco claims coverage under a NPDES permit but fails to comply with that permit will constitute a separate day of violation with respect to each unmet condition of that permit.

Filco is liable for the above-described violations occurring prior to the date of this letter and for every day after the date of this letter that these violations continue. In addition to the violations set forth above, this Notice covers all violations of the CWA evidenced by information that becomes available after the date of this Notice of Intent to File Suit.⁶¹ These violations are ongoing, and barring full compliance with the permitting requirements of the Clean Water Act, these violations will continue.

VI.

RELIEF REQUESTED

Riverkeeper will ask the court to order Filco to comply with the Clean Water Act, to pay penalties, and to pay Riverkeeper's costs and legal fees.

First, Riverkeeper will seek declaratory relief and injunctive relief to prevent further violations of the Clean Water Act pursuant to Sections 505(a) and (d), and such other relief as permitted by

⁶⁰ See 33 U.S.C. §§ 402(p)(3)(A) and (p)(4)(A) (requiring the establishment of industrial stormwater NPDES permits and of a permit application process).

⁶¹ See, e.g. *Public Interest Research Grp. v. Hercules, Inc.*, 50 F.3d 1239, 1248-49 (3d Cir.1995) (a notice that adequately identifies specific violations to a potential defendant also covers repeated and related violations that the plaintiff learns of later. "For example, if a permit holder has discharged pollutant 'x' in excess of the permitted effluent limit five times in a month but the citizen has learned only of four violations, the citizen will give notice of the four violations of which the citizen then has knowledge but should be able to include the fifth violation in the suit when it is discovered.").

law. Riverkeeper will seek an order from the Court requiring Filco to obtain NPDES permit coverage and to correct all other identified violations through direct implementation of control measures and demonstration of full regulatory compliance.

Second, pursuant to Section 309(d) of the CWA,⁶² each separate violation of the CWA subjects Filco to a penalty not to exceed \$32,500 per day for each violation which occurred between March 15, 2004 and January 12, 2009, and up to \$37,500 per day for each violation that occurred after January 12, 2009.⁶³ Riverkeeper will seek the full penalties allowed by law.

Third and lastly, pursuant to Section 505(d) of the CWA, Riverkeeper will seek recovery of litigation fees and costs (including reasonable attorney and expert witness fees) associated with this matter.

VII.

PERSONS GIVING NOTICE

The full name, address, and telephone number of the persons giving notice are as follows:

Riverkeeper, Inc.
20 Secor Road
Ossining, NY 10562
(914) 478-4501
Attn.: Sean Dixon

VIII.

IDENTIFICATION OF COUNSEL

Riverkeeper is represented by legal counsel in this matter. The name, address, and telephone number of Riverkeeper's attorneys are:

Reed Super
Edan Rotenberg
Alice R. Baker
Super Law Group, LLC
411 State Street, Suite 2R
Brooklyn, New York 11217
(212) 242-2355

⁶² 33 U.S.C. § 1319(d); *see also* 40 C.F.R. § 19.4 (Adjustment of Civil Monetary Penalties for Inflation).

⁶³ 40 C.F.R. § 19.2.

IX.

CONCLUSION

The foregoing provides more than sufficient information to permit Filco to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.⁶⁴

If Filco has developed a SWPPP, Riverkeeper requests that Filco send a copy to the undersigned attorney.⁶⁵ Otherwise, Riverkeeper encourages Filco to begin developing a SWPPP immediately after receiving this letter and asks that Filco please inform the undersigned attorney of Filco's efforts so Riverkeeper can work with Filco to avoid disputes over the contents of the SWPPP.⁶⁶

During the sixty-day notice period, Riverkeeper is willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of protracted litigation. If Filco wishes to pursue such discussions, please contact the undersigned attorney immediately so that negotiations may be completed before the end of the sixty-day notice period. We do not intend to delay the filing of a complaint in federal court, regardless of whether discussions are continuing at the conclusion of the sixty days.

Very truly yours,



Edan Rotenberg
Alice R. Baker
Super Law Group, LLC
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Brooklyn, New York 11217
(212) 242-2355

⁶⁴ 40 C.F.R. § 135.3(a).

⁶⁵ Note that under Part III.D.2 of the General Permit, the owner or operator of a facility "must make a copy of the SWPPP available to the public within 14 days of receipt of a written request."

⁶⁶ Riverkeeper will not send a new notice letter in response to any effort Filco makes to come into compliance with the Clean Water Act after receiving this letter, for example, by developing a SWPPP. The federal courts have held that citizens sending a notice letter are not required to identify inadequacies in compliance documents that do not yet exist and are "not required to send a second notice letter in order to pursue specific claims regarding the inadequacies of [a defendant's] post-notice compliance efforts." *WaterKeepers N. Cal. v. AG Indus. Mfg.*, 375 F.3d 913, 920 (9th Cir. 2004). See also *Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985, 997 (9th Cir. 2000) ("subject matter jurisdiction is established by providing a notice that is adequate on the date it is given to the defendant. The defendant's later changes . . . do not retroactively divest a district court of jurisdiction under 33 U.S.C. § 1365(b)."); *City of New York v. Anglebrook L.P.*, 891 F. Supp. 900, 908 (S.D.N.Y. 1995) (plaintiff's notice letter based on inadequacies of defendant's original SWPPP held sufficient to establish court's jurisdiction, even though defendant later prepared a revised SWPPP).

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cc:

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